IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1996 SESSION

FILED

April 15, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 03C01-9507-CR-00186**
Appellee,	)	
	)	**HAMILTON COUNTY**
VS.	)	
	)	**HON. STEPHEN M. BEVIL,**
RONALD S. AUSTIN,	)	**JUDGE**
	)	
Appellant.	)	(Guilty plea; sentence)

FOR THE APPELLANT:

LLOYD A. LEVITT
312 Vine St.
Chattanooga, TN 37403
(On Appeal)

W. GERALD TIDWELL, JR.
600 Dome Bldg.
Chattanooga, TN 37402
(At Plea and Sentencing Hearing)

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General & Reporter

MICHAEL J. FAHEY, II
Asst. Attorney General
450 James Robertson Pkwy.
Nashville, TN 37243-0493

GARY D. GERBITZ
District Attorney General

DEE ANNE IRWIN
-and-
THOMAS J. EVANS
Asst. District Attorneys General
Hamilton County-Chattanooga
Courts Bldg.
Chattanooga, TN 37402

OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted for theft of property and forgery. He pled guilty to both counts. After a hearing, the court below sentenced the defendant as a Range II offender to the maximum of eight years for each offense, to be served concurrently. Approximately one week after the hearing, the defendant filed a pro se motion to withdraw his guilty pleas, which the lower court denied after an evidentiary hearing. The defendant now appeals as of right, claiming the trial court erred in denying his motion to withdraw his pleas, and that his sentence is excessive. After our review of the record, we affirm the judgment below.

The State contends that the defendant failed to file a notice of appeal with respect to the trial court's denial of his motion, resulting in a waiver of this issue. We find the notice of appeal was premature and choose to treat it as having been filed after entry of the judgment. See T.R.A.P. 4(d). Even so, we find this issue to be without merit.

The defendant contends that he should have been allowed to withdraw his guilty plea after sentence had been pronounced because he "did not receive the sentence concession contemplated by the Attorney of record in said case as was agreed to in the Judge Chamber conference that was had outside of Defendant," and that he will suffer a "manifest injustice" unless he is permitted to withdraw his plea.

The defendant was initially represented by Philip L. Duval, an appointed lawyer. During Mr. Duval's tenure, the defendant received a plea bargain offer of six years. The defendant did not accept that offer, and the State later increased it to seven years. The defendant then changed lawyers, retaining Mr. W. Gerald Tidwell, Jr. to represent him. Mr. Tidwell subsequently went to court to request the substitution of counsel and to request a thirty day continuance on the defendant's settlement date. Mr.

Tidwell testified that he and Mr. Duval and the prosecuting attorney met briefly in the judge's chambers to discuss the status of the case. According to Mr. Tidwell's testimony, "The Judge inquired as to whether or not he thought that -- we thought the case was going to be tried, and I believe it was either me or [Mr. Duval], or both of us, that said, 'As I understand it, . . . I don't think there's a factual dispute over whether he committed the offenses, it's more of an argument over the sentence, as I understand it.' . . . I recall the Judge making some statement to the effect, well, surely, or something like that, reasonable minds can come to some agreement, which I took to be a fairly innocuous statement at the time."

Mr. Tidwell testified that, following this conference in chambers, he had repeated the conversation to his client and advised him that he thought "it would be a mistake to try a case where you have no defense," because the defendant had already confessed to the crimes. He also advised his client that he didn't think he would be given more than seven years after a sentencing hearing, because, at that point, he "had never had a client in state court sentenced to a maximum sentence by a judge." Based on his counsel's advice, the defendant decided to make a "blind" plea in hopes that he would be sentenced to no more, and possibly less, than seven years.

The defendant recalled his conversation with Mr. Tidwell differently. At the hearing on his motion to withdraw his plea, the defendant testified that Mr. Tidwell had told him that, during the in-chambers conference, the judge had told the prosecuting attorney that "they should re-think their offer, because they was [sic] being a bit excessive." Accordingly, he claims, he was led to believe that the judge was inclined to sentence him to less than seven years.

Whether to grant a motion to withdraw a guilty plea rests within the sound discretion of the trial court. State v. Haynes, 696 S.W.2d 26, 29 (Tenn. Crim. App. 1985).

In order for us to reverse the trial court's decision, the defendant must demonstrate that the trial court abused its discretion in denying his motion. State v. Davis, 823 S.W.2d 217, 220 (Tenn. Crim. App. 1991). Because the defendant has not done so, we affirm the judgment below.

After reviewing the record of the defendant's guilty plea, the trial court determined that his plea had been entered knowingly and voluntarily. Our review of the record results in the same conclusion. With respect to the defendant's sentence, the court specifically asked "Has anybody promised you any particular sentence at [the sentencing] hearing?" The defendant replied, "No, sir." The court also asked the defendant, "You understand, Mr. Austin, that whatever sentence you get in this case will be up to the Court to set at that sentencing hearing, and how much of this time you serve, whether you serve the balance of the sentence or part of the sentence or no more of the sentence is a decision this Court will make, based on that sentencing hearing, based on a pre-sentence investigation, and any testimony that's offered at that time?" Again, the defendant replied, "Yes, sir."

A defendant is permitted to withdraw a guilty plea after the sentence has been imposed, but before the judgment becomes final, only "to correct manifest injustice." Tenn. R. Crim. P. 32(f). An example of "manifest injustice" is the State's failure to furnish exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), and the defendant's resulting conclusion to plead guilty. State v. Davis, 823 S.W.2d at 220. That is, a denial of due process constitutes a manifest injustice. Id. "The plea will not be set aside, however, merely because the defendant experiences a change of heart." Id.

The defendant here tries to argue that a manifest injustice occurred when the trial judge engaged in his discussion with Mr. Tidwell and the prosecuting attorney, and that his alleged remark to the State violated Tenn. R. Crim. P. 11(e), which provides

that “The court shall not participate in any such [plea agreement] discussions.” We disagree. First, the record does not convince us that the trial court “participated” in any plea agreement discussions. Thus, we find that no violation of Rule 11(e) occurred. Second, even if the trial court did violate Rule 11(e), such a violation does not rise to the level of a due process violation sufficient to meet the meaning of “manifest injustice.”

Nor did a manifest injustice occur when the defendant received a greater sentence than he alleges he thought he was going to receive. Whether or not the defendant actually believed that the judge would sentence him to no more than seven years, and whether or not he was justified in believing so (if he did), the defendant was clearly and plainly advised during his guilty plea of the minimum and maximum sentences possible on his convictions, that no sentence had been promised, and that his sentence would be determined by the court following a sentencing hearing at which evidence relevant to his sentence would be introduced. The defendant raised no objection, asked no questions, and simply responded that he understood the judge. He will not be heard to complain now.

With respect to the defendant’s second issue, that his sentence is excessive, we disagree. When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

The record of the sentencing hearing in this matter affirmatively shows that the trial court considered all of the appropriate principles, facts and circumstances.

Accordingly, the presumption of correctness attaches. The court further found that four enhancement factors applied: a previous history of criminal convictions in excess of those necessary to establish the appropriate range; the defendant was the leader in the commission of the offenses; the defendant had a previous history of unwillingness to comply with the conditions of a sentence involving release in the community; and these offenses were committed while the defendant was on parole. T.C.A. § 40-35-114(1), (2), (8), (13)(B). The court also found as a mitigating factor that the offenses neither caused nor threatened serious bodily injury. T.C.A. § 40-35-113(1).

The Sentencing Reform Act of 1989 provides that the minimum sentence within the range is the presumptive sentence for Class B, C, D and E felonies. T.C.A. §40-35-210. The defendant's offenses were Class D felonies. However, where there are enhancing and mitigating factors, the court must start at the minimum sentence in the range and enhance the sentence as appropriate for the enhancement factors and then reduce the sentence within the range as appropriate for the mitigating factors. Id. (emphasis added). The weight to be given each factor is left to the discretion of the trial judge. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

The court sentenced the defendant to the maximum sentence for each offense, stating, "Based on the number of enhancement factors and the quality of those enhancement factors, the fact that -- the number of prior convictions that the defendant has, the fact that he has been on release status before and has failed to comply with those conditions, and the fact that he was on parole while committing this offense[sic], this Court finds that the appropriate sentence in his case would be eight years in the state penitentiary." Thus, the trial court did not reduce the defendant's sentences based on the single mitigating factor found.

The defendant has not carried his burden of showing that his sentence is

improper. While the defendant argues that the trial court should have found and applied additional non-statutory mitigating factors, the trial court was not required to do so and the evidence does not preponderate against the court's decision not to do so. Moreover, the trial court was entitled to give the sole mitigating factor little weight in assessing the defendant's sentence, and was entitled to find that no reduction from the enhanced sentence was appropriate. As to the defendant's argument that the trial court erred in applying both the defendant's previous unwillingness to comply with conditions of release, and his parole status at the time of the instant offenses, we find this argument to be without merit. Nothing in the statute setting forth the enhancement factors, T.C.A. § 40-35-114, indicates that these two particular factors should be applied in the alternative. Nor does the defendant cite any authority in support of his position. The trial court's application of both factors was correct.

For the reasons set forth above, we affirm the judgment below.

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JOHN H. PEAY, Judge

CONCUR:

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JOE B. JONES, Judge

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DAVID H. WELLES, Judge